No. 87-416

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES CATHOLIC CONFERENCE

and

NATIONAL CONFERENCE OF CATHOLIC BISHOPS,
Petitioners,

v.

ABORTION RIGHTS MOBILIZATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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The main thrust of the Respondents' Brief in Opposition is that the Petition for a Writ of Certiorari should be denied because it seeks to create a broad exception to the general rule against interlocutory appeals. That argument reflects a total misconception of the issue in this case. This case does not involve an interlocutory order, and the issue has nothing to do with interlocutory appeals. The order under review is a final judgment of civil contempt, which was immediately appealable under well-established principles of appellate jurisdiction. *See United States* v. *Ryan*, 402 U.S. 530 (1971).

The issue in this case is not one of appellate jurisdiction. It is rather one of the district court's power under Article III of the Constitution—its power to adjudicate a challenge by private parties to the tax exempt status of the Catholic Church, its power to subpoena Church documents at the request of those parties, and its power to enforce such a subpoena through civil contempt.

1. Petitioners, the United States Catholic Conference and National Conference of Catholic Bishops ("USCC/NCCB"), have invoked the principle that a judicial subpoena may be issued, and civil contempt ordered, only to further the resolution of a case or controversy over which the court has power under Article III of the Constitution. It is true that in resisting the subpoenas and contempt motion on this ground, USCC/NCCB presented the same Article III standing argument that the federal defendants had asserted in arguing that the case should be dismissed. But that fact does not render the order of contempt "interlocutory." A civil contempt order is final, and it may be attacked on appeal on the same grounds upon which it may be resisted in the district court—including the ground that the district court lacked Article III power to act.

2. Respondents assert that the Article III standing issue "is addressed solely to [the court's underlying] subject matter jurisdiction" and "has nothing whatever to do with the contempt order." Brief in Opposition ("Opp.") 32. That assertion simply ignores the central question posed by this petition: whether the limitations imposed by Article III apply to a court's power to issue subpoenas and enforce them through civil contempt.

Article III standing, it bears emphasis, is not merely a facet of "subject matter jurisdiction," but a "requirement . . . derived directly from the Constitution." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). It thus marks the

outer boundary of a federal court's power. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-42 (1950), this Court stated unequivocally that the judicial power to issue and enforce subpoenas is dependent upon the existence of an Article III case or controversy. And in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), the Court stated that a civil contempt order cannot be sustained if the issuing court was without subject matter jurisdiction. It is the inconsistency between those pronouncements by this Court and the decision below that makes this case one of exceptional importance. Yet the respondents make no attempt to reconcile their position with *Morton Salt* and *United Mine Workers*. They note simply that those cases do not authorize interlocutory appeals, Opp. 28—a point which, although accurate, is irrelevant.

3. Respondents apparently take the position that although Article III power is necessary to decide a case, it is not necessary to preside over a case in its discovery stage, to issue subpoenas, or to impose penalties of civil contempt for noncompliance. There is nothing to support that position. Article III extends the "judicial Power" to cases and controversies, and the "judicial Power" includes not only the power to decide a case on the merits, but also the power to subpoena witnesses and hold them in contempt. There is simply no basis for removing the subpoena power and contempt power from the strictures of Article III. There are, in fact, compelling reasons to insist that the burdens of discovery and contempt not be imposed if the Constitution deprives the court of power to resolve the underlying dispute. The burdens and costs of discovery are often more significant from a practical standpoint than the actual outcome of a case. And in some cases—perhaps this is one—the desire to pursue discovery may be the principal reason for bringing a lawsuit in the first place. The burdens of contempt, as the $100,000 daily fine in this case illustrates, can be

even greater. The sensible and just rule—and the rule suggested by *Morton Salt*—is that a court without Article III power to decide a matter is also without power to issue and enforce subpoenas that can only be justified by the need to prepare the matter for decision.

4. Like the panel majority, the respondents rely upon *Blair* v. *United States*, 250 U.S. 273 (1919). But *Blair* simply held that a grand jury witness may not challenge a subpoena on the ground that a statute that may have been violated was unconstitutional. In the 68 years since *Blair* was decided, it has never been cited for the proposition that a witness subpoenaed in a civil case is precluded from challenging the Article III power of the court to act. And, indeed, the rationale of *Blair* is wholly inapplicable to a case like this one.

First, as noted in the Petition, at 17, and the dissent below, A. 34a-36a, the judicial power, unlike the power of a grand jury, is limited by Article III. Second, judicial proceedings are conducted in an entirely different fashion. As the Court explained in *Blair*, "examination of witnesses by a grand jury need not be preceded by a formal charge." 250 U.S. at 282. The "question whether the facts show a case within [the grand jury's] jurisdiction" and, if so, the "precise nature of the offense . . . normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Id.* at 282-83 (citation omitted). It is premature and speculative for a witness to anticipate these matters by raising a constitutional challenge to a statute that may or may not be invoked by the grand jury.

In contrast to a grand jury proceeding, a civil case is initiated by a formal complaint. The precise nature of the claim is stated at the beginning of the case, not at its conclusion. And in the ordinary case, it can be determined at the outset "whether the facts show a case within [the court's] jurisdiction." *Id.* at 283. Of course,

if the court's jurisdiction cannot be determined at the outset, the court has power to order discovery to determine its jurisdiction. See Petition at 16. But when, as in this case, it can be determined at the outset whether the court has Article III power, there is nothing in *Blair* that bars the witness from raising the issue, or that disables the court from deciding it.

A recent decision of the United States Court of Appeals for the District of Columbia Circuit underscores the limited scope of *Blair*, even in the grand jury context. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987) (*per curiam*). Distinguishing the "speculati[ve]" challenge asserted in *Blair*, the court held that a grand jury witness can defend against a grand jury subpoena and subsequent contempt charge by challenging the authority of the prosecutor to act. *Id.* at 779. Citing *United States* v. *Ryan*, 402 U.S. at 532, the court held that a witness has "just cause" to resist a subpoena as "unduly burdensome or otherwise unlawful" if its issuance was without lawful authority. 827 F.2d at 778. As the court noted, other courts have consistently permitted grand jury witnesses to resist subpoenas, and defend against contempt charges, by "mounting [a] challenge to the authority under which the subpoenas issued." *Id. See, e.g., In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirlomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975). To the extent the panel majority in this case held that a subpoenaed party may not challenge the power of the issuing authority to act, that decision conflicts with *In re Sealed Case* and the other decisions upon which it relied.

The reliance of the panel majority and the respondents upon *Blair* in this case is, petitioners contend, entirely misplaced. If there is uncertainty about *Blair*'s meaning, however, then that in itself is an important reason for this Court to grant the petition. This Court has never

addressed the possible applicability of *Blair* to a judicial subpoena issued under the authority of Article III. At the very least, the extension of *Blair* to such a case is in tension with this Court's subsequent pronouncements in *United Mine Workers* and *Morton Salt Co.*, and is deserving of the Court's attention.

5. Respondents warn of "devastating consequences on the ability of the district courts . . . to manage the flow of litigation," if witnesses can challenge the power of the court to issue subpoenas. Opp. 32. Intolerable delays will result, they argue, and witnesses will necessarily be free to "assert[] any other defect that would warrant dismissal of the underlying action." Opp. 34-35 n.20. Neither argument has merit. This Court has already held in *Ryan* that when a witness is found in contempt for failing to comply with a subpoena, his interest is sufficient to permit an appeal of the contempt order notwithstanding its effect on the underlying litigation.[1] And allowing the petitioners' challenge would not open the floodgates to subpoena contests based upon the merits of the underlying action. The petitioners do not now challenge the merits of the complaint; they challenge the court's constitutional power to consider it. The courts *always* have an obligation to consider their power to act, *see, e.g., Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326, 1331, 1334 (1986), and reaffirming that obligation at the subpoena and contempt stages poses no threat whatsoever to the orderly administration of justice. *Cf. In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281

[1] Respondents necessarily concede that witnesses may appeal contempt citations based on a number of evidentiary privileges, the burdensomeness or overbreadth of a discovery request, or the harassing nature of the request. These issues may be far more time consuming and difficult to address than attacks on the court's power to issue and enforce process, because they are fact-specific as to each witness. Yet there is no suggestion that after *Ryan* federal courts have been unable to cope with the effect of contempt appeals on underlying litigation.

(9th Cir. 1987) (vacating contempt citation on the ground that bankruptcy court lacked jurisdiction to order civil contempt).

6. Respondents' arguments on the "merits" of the Article III standing issue merely highlight the importance of that issue. If respondents are permitted to maintain this suit, it would be the first case ever to grant standing to a plaintiff challenging the tax status of a third party. The decision would undermine this Court's decision in *Allen* v. *Wright*, 468 U.S. 737 (1984), and reopen the courthouse door to suits that "are rarely if ever appropriate for federal-court adjudication." *Id.* at 760. Religious organizations like the petitioners would find themselves subject to intrusive examination by their detractors. And the courts would find themselves in the business of second-guessing the IRS's judgments regarding what alleged violations of the Code to investigate and how to enforce the myriad restrictions imposed on exempt organizations. The question whether the respondents, whose tax status is not at issue, have the right to insist on such a judicial undertaking is worthy of this Court's attention.

7. The petitioners and the respondents appear to agree on one point—that the issues in this case are of fundamental importance. The reason is not, as the respondents contend, that the USCC/NCCB position would create a broad exception to the general rule against interlocutory appeals. It is rather that the position of the respondent and the court of appeals majority would create a broad exception to a more basic rule of federal Constitutional law—that the judicial power extends only to the resolution of cases and controversies.

CONCLUSION

For these reasons and the reasons stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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